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No. 86-6169

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM WAYNE THOMPSON,

Petitioner,

—vs.—

THE STATE OF OKLAHOMA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF
CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

**BRIEF OF THE OFFICE OF THE STATE APPELLATE
DEFENDER OF ILLINOIS AS AMICUS CURIAE**

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QUESTION PRESENTED

1. Whether evolving public standards of decency and fundamental fairness require the prohibition of the application of the death penalty in cases where the defendant was a juvenile at the time of commission of the offense, pursuant to the eighth and fourteenth amendments?
2. Whether the prohibition of the application of the death penalty should extend to all persons under eighteen years of age at the time of commission of the offense?

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To The Court Of Criminal Appeals
Of The State Of Oklahoma

Brief Of The Office Of The State
Appellate Defender Of Illinois
As Amicus Curiae

INTEREST OF AMICUS CURIAE

Theodore Gottfried is the State Appellate Defender for Illinois. For the past fifteen years, the Office of the State Appellate Defender has been appointed by the circuit courts to

represent indigent criminal defendants on appeal in Illinois. Ill.Rev.Stat., 1972, Ch. 38, Sec. 208-1. Currently, the Office of the State Appellate Defender handles the majority of indigent criminal appeals throughout the State of Illinois. Additionally, the Office of the State Appellate Defender is appointed to represent indigent criminal defendants who are sentenced to death on their automatic appeal in the Illinois Supreme Court. Of the more than 100 cases currently on appeal from sentences of death, the Office of the State Appellate Defender represents over half of the appellants.

Currently, the minimum age for which the death penalty can be imposed in Illinois is eighteen. Ill.Rev.Stat., 1982, Ch. 38, Sec. 9-1(b). If the defendant was younger than eighteen at the time of commission of the offense,

the death penalty cannot be imposed under current law in Illinois.

At issue before this Court in Thompson v Oklahoma, is whether the United States Constitution precludes imposition of the death penalty for juveniles. In the event this Court holds that it is constitutional to impose the death penalty on a juvenile, then it is likely that the Illinois Legislature will consider lowering the age of jurisdiction for the death penalty in Illinois. One newspaper article recently included a quotation from a state representative in Illinois advocating lowering the age of jurisdiction to include 15, 16, and 17 year olds in the penalty of the death sentence. THE HAMMOND TIMES, "Teens Escape Death Row", Jan. 25, 1987, page 1. In the event Illinois lowers the age of jurisdiction of the death penalty, the Office of the State Appellate Defender

will be responsible for representing any juveniles sentenced pursuant to the lowered age requirement.

Thus, amicus is familiar with issues arising from the representation of persons sentenced to the death penalty, and is concerned that the application of the death penalty not be extended to include juveniles. Moreover, amicus believes that the history of the death penalty in Illinois reflects an emerging public consensus that eighteen is the appropriate dividing line for purposes of application of the death penalty. For these reasons, amicus urges this Court to hold that the United States Constitution precludes the imposition of the death penalty in the case of a defendant who was under eighteen years of age at the time of commission of the offense.

SUMMARY OF ARGUMENT

The eighth amendment was intended to be flexible in its interpretation of what constitutes a cruel and unusual punishment in order to expand to reflect changing public values. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). The history of the development of a separate court system for juveniles reflects society's evolving recognition that juveniles are different from adults and need special protections due to their youth and immaturity. Thus, the public values regarding youth in this country have changed over the years, and legal protections have expanded in order to reflect these changes.

This concern for the protection of adolescents has been reflected in the laws authorizing a death penalty in states which have recently reviewed the requirements for the imposition of this

most extreme of all sanctions. Fourteen state legislatures, including Illinois, have debated the issue of whether juveniles should be executed and have concluded they should not be subject to the death penalty. Further, ten of these states have chosen the age of eighteen as the dividing line.

Therefore, society has gradually developed a moral abhorrence of the application of the death penalty to juveniles, and has indicated its selection of age eighteen as the most logical dividing line. In reflecting these changing social values, the eighth amendment must therefore be found to prohibit the execution of juveniles under eighteen at the time of commission of an offense.

ARGUMENT

EVOLVING PUBLIC STANDARDS OF DECENCY
AND FUNDAMENTAL FAIRNESS CLARIFY THAT

THE EIGHTH AND FOURTEENTH AMENDMENTS
PROHIBIT THE APPLICATION OF THE DEATH
PENALTY IN CASES WHERE THE DEFENDANT
WAS A JUVENILE AT THE TIME OF COMMIS-
SION OF AN OFFENSE.

Persons who were juveniles at the time of commission of an offense are precluded by their age from fully appreciating the consequences of their actions. As the most extreme sanction available, the death penalty should be imposed sparingly, being reserved for only the most serious offenders who present no foreseeable hope of rehabilitation. Illinois has concluded that juveniles, because of their youth, cannot be said to be utterly lacking in rehabilitative potential. Thus, Illinois has prohibited by statute imposition of the death penalty against any person under eighteen years of age at the time of commission of an offense. The position taken by Illinois is representative of the expanding public consensus that

juveniles, who are limited by their youth from fully comprehending the consequences of their actions, are not by definition fit candidates for imposition of the most extreme sanction available.

The eighth amendment ban on cruel and unusual punishments was designed to be flexible in order to incorporate evolving standards of decency. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). As Mr. Justice Marshall stated in his concurring opinion: "Perhaps the most important principle in analyzing 'cruel and unusual' punishment questions is one that is reiterated again and again in the prior opinions of the Court: i.e., the cruel and unusual language must draw its meaning from the evolving standards of decency that mark the progress of a maturing society. Thus, a penalty that was permissible at one time in our

Nation's history is not necessarily permissible today." 33 L.Ed.2d at 401. Evolving standards of decency in our society reveal that the public has reached a consensus that imposition of the extreme sanction of the death penalty in a case where the defendant was a juvenile at the time of commission of the offense is morally unacceptable. These evolving standards are reflected in the history of treatment of juveniles in Illinois.

Illinois has a proud tradition of evidencing concern for its juvenile population. In 1899, Illinois was the first state in the nation to adopt a juvenile court statute. In re Urbasek, 38 Ill.2d 535, 232 N.E.2d 716, 718 (1967). Other states quickly followed the lead of Illinois, creating special courts for children in every state during the period from 1899 to 1925. Whitebread

and Batey, "The Role of Waiver in the Juvenile Court: Questions of Philosophy and Function", Hall, Hamparian, Pettibone, and White, eds., Major Issues in Juvenile Justice Information and Training: Readings in Public Policy -- Youth in Adult Courts (Acad. for Contemporary Problems, 1981) at 208. These juvenile courts were established to operate informally and without legal process in order to rehabilitate "wayward" children through the use of the developing behavioral sciences of psychiatry, psychology and sociology. Id.

Eventually, dissatisfaction developed with the operation of these juvenile courts leading to the conclusion that some due process rights should apply for the protection of the minors since "There is evidence, in fact, that there may be grounds for concern that the child

receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." Kent v. United States, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84, 94 (1966). Thus, essential rights of due process, including notice, right to counsel, right to confrontation and the privilege against self-incrimination, were extended to juvenile delinquency proceedings in In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). The requirement that proof be beyond a reasonable doubt was also extended to juvenile proceedings. In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). However, the philosophical rehabilitative ideal of the separate juvenile court system was left unchanged in Gault and Winship.

Subsequent decisions continued to uphold the philosophical rehabilitative ideal of the juvenile court system. In concluding that the right to a jury trial should not be extended to juveniles, this Court reviewed the relative success of this evolving separate system of justice for minors:

The juvenile concept held high promise. We are reluctant to say that, despite disappointments of grave dimensions, it still does not hold promise, and we are particularly reluctant to say, as do the Pennsylvania appellants here, that the system cannot accomplish its rehabilitative goals. So much depends on the availability of resources, on the interest and commitment of the public, on willingness to learn, and on understanding as to cause and effect and cure. In this field, as in so many others, one perhaps learns best by doing. We are reluctant to disallow the States to experiment further and to seek in new and different ways the elusive answers to the problems of the young, and we feel that we would be impeding that experimentation by imposing the jury trial.

McKeiver v. Pennsylvania, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647, 662 (1971). Minors were viewed as different from adults in that they were both more amenable to rehabilitative treatment and, due to their youth, less criminally responsible for their actions. In reviewing the grant of the right to confrontation in Gault, this Court took note of the relative immaturity of teenagers within the criminal justice system:

Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. A 15-year-old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition. Mature men possibly might stand the ordeal from midnight to 5 a.m. But we cannot believe that a lad of tender years is a match for the police in such a contest. He needs

counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him. 18 L.Ed.2d at 556.

Thus, for nearly a century states in this country have been gradually creating a separate court system for juveniles, based on the premise that minors are different from adults and need greater protections.

This concern for the protection of adolescents is reflected in the evolution of the qualifications for the death penalty in Illinois. Of the 281 juveniles executed in this country's history, only one minor has ever been executed in Illinois for a crime committed while under age eighteen. An Examination of Executions in America: The Espy File (Mar. 18, 1986) (Paper presented at the Annual Meeting of the Academy of Criminal Justice Sciences; Orlando, Fla.) (Avail-

able from Professor John Smykla, University of Alabama.) The sole juvenile executed in Illinois was Charles Walz, who was put to death on February 20, 1929 for the offense of murder committed when he was seventeen years old. Streib, Victor; Death Penalty for Juveniles, Indiana University Press (To be published this summer (A copy can be obtained from Prof. Streib at Cleveland-Marshall College of Law, Cleveland, Ohio) The line of demarcation between adult and child was not specifically stated within the pre-Furman Illinois statute. Ill.Rev. Stat., 1973, Ch. 38, Sec. 1005-8-1A; Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.E.2d 346 (1972); People ex rel. Rice v. Cunningham, 61 Ill.2d 353, 336 N.E.2d 1 (1975). In 1982, P.A. 82-677 became effective and set forth the requirement that a person be eighteen years of age at the time of commission of

an offense in order to qualify for imposition of the death penalty.

Ill.Rev.Stat., 1982, Ch. 38, Sec. 9-1(b).

Thus, the line of demarcation in Illinois between juvenile and adult for purposes of imposing the death penalty has gradually evolved from the failure to promulgate any specific age requirement within the death penalty statute to the specific requirement of age eighteen.

This Court quoted from a Task Force Report indicating philosophical agreement with Illinois' approach of excluding minors from the death penalty in its decision in Eddings v. Oklahoma:

"Adolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long range terms than adults. Moreover, youth crime as such is not exclu-

sively the offender's fault; offenses by the young also represent a failure of family, of school, and the social system, which share responsibility for the development of America's youth." Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, *Confronting Youth-Crime* 7 (1978).

Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1, 11 (1982). In Eddings, this Court held that youth is a relevant mitigating factor since minors are less mature and responsible than adults, but failed to address the issue of whether the eighth amendment prohibits execution of juveniles. This footnote cited in Eddings clarifies that minors should be excluded from the death penalty.

The immaturity of adolescents has led a number of states to conclude, as did Illinois, that the death penalty should not apply to youth under the age of eighteen years. Of the 36 states

which presently have a death penalty statute, the legislatures of fourteen states have examined the issue of whether to apply the death penalty to minors, and 10 of those 14 states have chosen the age of eighteen as the age of execution.

Streib, "The Eighth Amendment and Capital Punishment of Juveniles", 34 Cleveland State Law Review 363 (1987). Thus, the majority of the states which have considered the issue have chosen eighteen as the most appropriate age for application of the death penalty.

Additionally, there is international agreement that eighteen is the appropriate age for execution. Three quarters of the countries which prohibit capital punishment for juveniles have chosen the age of eighteen as the dividing point.

Streib, "The Eighth Amendment and Capital Punishment of Juveniles", 34 Cleveland State Law Review 363 (1987). As Streib,

points out, "More than three-fourths of the nations of the world (seventh-three of the ninety-three reporting countries) have set age eighteen as the minimum age for capital punishment." Id., 389.

Finally, the American Bar Association recommends selection of the age of eighteen as the dividing point since eighteen is the most common age for the granting of adult privileges, such as voting and drinking. "ABA Opposes Capital Punishment for Persons Under 18", 69 A.B.A.J. 1925 (1983).

It is obvious, therefore, that the emerging national and international consensus is that the sanction of the death penalty should not apply to juveniles. Further, there is widespread agreement that eighteen is the appropriate age to select as the dividing point for purposes of availability of the death penalty. In light of this overwhelming

indication of public abhorrance at the execution of juveniles, the Eighth Amendment clearly prohibits the use of the death penalty for minors.

CONCLUSION

The state legislatures of this country have taken great strides in recognizing the special needs of juveniles and in protecting youths from extreme sanctions such as the death penalty. This evolving concern that juveniles not be executed reflects the changing moral values of our society. The eighth amendment was designed to reflect changing social values in its interpretation of what constitutes a cruel and unusual punishment. Thus, amicus urges this Court to hold that the eighth amendment recognizes these changing social values and thereby prohibits the execution of juveniles

under eighteen years of age at the time of commission of an offense.

Respectfully submitted,

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